

FRONT LINE

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Nixon calls for changes in insanity laws



A CRIMINALLY insane killer who disappeared in Kansas City while on release from a mental institution prompted Attorney General **Jay Nixon** to renew his call for the legislature to make changes in not guilty by reason of insanity (NGRI) laws.

His proposals include keeping all NGRI patients in secure facilities and requiring patients seeking releases to meet a higher burden of proof that they are well and/or not a danger.

“These violent offenders need to be treated like the public safety risk they are.”

Attorney General **Jay Nixon**

Current law allows that patients can be kept in the least restrictive environment and can be permanently released from custody by establishing only a 51 percent chance they won't hurt anyone.

The House Civil and Criminal Law Committee has approved the changes, including a proposal extending crime victims rights legislation to cover victims of the criminally insane.

In the Kansas City case, despite objections from prosecutors and Nixon, Robert Rousseau was granted a conditional release after officials indicated he would be supervised.

Rousseau pleaded not guilty by reason of insanity for the 1990 stabbing death of a young woman.

Supreme court rulings favorable for police



U.S. justices allow seizure of assets

THE U.S. SUPREME COURT has given police broader authority to seize private property linked to crimes.

In *Bennis v. Michigan*, 94-8729, the court ruled Michigan's asset forfeiture scheme does not violate the 14th Amendment (due process clause) or the 5th Amendment (takings clause).

The judges voted 5-4 to uphold the seizure of a car owned by a Michigan couple after the husband was arrested in the car for having sex with a prostitute.

The wife argued the \$600 vehicle was improperly confiscated because she was co-owner

and did not know of her husband's activity. The car was forfeited as a public nuisance under Michigan's statutory abatement scheme.

The justices ruled that the state's scheme has not deprived the woman of her interest in the car without due process, citing a long line of cases in which the court has held that an owner's interest in property may be forfeited by illegal use of the property even if the owner was unaware.

The court also ruled the scheme has not taken the woman's property for public use without compensation because the forfeiture proceeding was legal.



State justices void 'John Denver defense'

THE STATE SUPREME COURT has voided the use of the "John Denver defense" in DWI cases.

The court ruled that Missouri law, which provides for both criminal prosecution and the administrative suspension or revocation of an intoxicated driver's license for the same conduct, does not constitute double jeopardy since the administrative proceedings are remedial, not punitive, in nature.

"Revoking or suspending the license of an intoxicated driver is an important precautionary measure taken to protect society," said Attorney General **Jay Nixon**.

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LEGISLATIVE UPDATE

The Missouri legislature is tackling several issues that are important to law enforcement.



AT PUBLICATION, no final decision had been made on legislation that again would make speeding and careless and imprudent driving a misdemeanor.

A bill making the change is progressing through the legislature.

However, the Senate passed and sent to the governor a bill to increase the speed limits. The bill is expected to be signed the week of March 11. It will take effect then.

The new limits will be 70 mph on rural interstates; 60 mph on urban interstates; 65 mph on rural four-lane, divided highways; 60 mph on two-lane numbered roads; and 55 mph on lettered roads.

Concealed weapons legislation is being discussed again. This version does not call for a public vote.

Front Line will report all pertinent legislative changes enacted.

ROUNDUP OF PROPOSED LEGISLATION

HB 768: Adds armed criminal action that causes catastrophe, felonious restraint, voluntary man-slaughter and first-degree drug trafficking to the list of dangerous felonies. Requires offenders to serve 100 percent of sentences.

HB 780: Increases the penalty of prostitution to a felony and mandates an HIV test for offenders.

HB 800: Creates the crime of eluding a law enforcement officer.

HB 818: Allows a prosecuting attorney to obtain an order that forces a witness pleading the 5th amendment to testify. Failure to testify is grounds for contempt of court.

SB 510: Allows citizens and officers to report drivers who can't safely operate a vehicle to

the state Department of Revenue. The department could revoke the reported driver's license and have a physician examine the person.

SB 520: Prohibits people from riding in an open truck bed except for agricultural and ceremonial purposes.

SB 535: Makes calling in a false bomb report a class C felony.

SB 550: Allows collective bargaining for public employees except university educators.

SB 588: Mandates first-responder training and cardio-pulmonary resuscitation for all peace officers.

SB 642: Prohibits jumping from public bridges.

SB 675: Allows retired peace officers, state court judges, and prosecuting and circuit attorneys to carry concealed weapons.

JOHN DENVER DEFENSE

CONTINUED from Page 1

"Its purpose is to ensure a drunken driver does not endanger the lives of other drivers by continuing to drive drunk."

The double jeopardy defense has been argued in DWI cases in Missouri and throughout the country after lawyers representing singer John Denver effectively used the defense

to obtain dismissal of a DWI charge.

The court's opinion involved two cases that were transferred directly to the state's top court at Nixon's request and consolidated.

The court held that a criminal prosecution for DWI is not barred by a prior administrative suspension or revocation of a drivers license. In the other case, the court agreed that an administrative suspension of a drunken

driver's license did not bar a subsequent criminal prosecution for the same conduct.

Nixon successfully urged the court to hear the cases under a special rule that authorizes the immediate transfer of cases to the Supreme Court because of their "interest and importance." The two cases, one criminal and one civil, originated in Jackson and Franklin counties and reverse the rulings.



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UPDATE: CASE LAWS**EASTERN DISTRICT****State v. Kevin M. Ivory**

No. 66245

Mo. App., E.D., Dec. 26, 1995

In a prosecution for first-degree murder and armed criminal action, the prosecutor sought to question the victim's sister about a conversation the day before the shooting in which the victim said she was afraid of the defendant.

The state argued the evidence was relevant to the victim's state of mind. The court noted that the victim's state of mind was not relevant because the defendant did not claim accident or self-defense but simply put the state to its burden of proving the defendant's guilt beyond a reasonable doubt.

While cases recognize evidence of the victim's state of mind, state of mind is not necessarily relevant and may be admitted in limited situations such as claims of accident or self-defense. However, evidence of the victim's fear did not stand alone — the sister interceded with the defendant, with whom she once had a relationship, and secured his assurance he would not harm her brother.

The jury might conclude the defendant lulled the victim into a sense of security so that he entered the defendant's car willingly and

without hesitation, and that the defendant intended to kill him as soon as he could. Thus, the entire circumstances made the showing relevant.

The court also admitted testimony by several of the victim's colleagues that the victim told them that he had taken 90 or 98 pills of a controlled substance from the defendant's "stash" in retaliation after the defendant took and kept the victim's gun.

The conversations were clearly admissible as declarations against the interest of an unavailable witness. Even if the victim could not have a proprietary interest in an illegal controlled substance, his admission of possession was contrary to his penal interest. The evidence also tended to show the defendant had a possible motive.

State v. Keith Mulder

No. 67325

Mo. App., E.D., Jan. 2, 1996

There was insufficient evidence of the defendant's guilt of attempted first-degree robbery and the defendant was ordered discharged.

The defendant entered a service station, slammed a stick on the counter and requested money. The cashier testified she was shocked but merely stood and stared at the man through a bullet-proof window.

The defendant threatened to pull a gun but never did, and the cashier did not believe he had a gun. The cashier responded "show me a gun and I'll give you the money."

The defendant did not attempt to enter the locked, self-contained cubicle where the cashier worked nor

did he strike the surrounding bullet-proof window. He then fled.

The court found insufficient evidence. There was no proof the defendant had an apparent possibility to commit robbery first-degree. The only inculpatory evidence is the defendant entered the service station with a stick, slammed it on the counter and demanded money.

The cashier was safe behind bullet-proof glass when the defendant demanded money. Under these facts, the stick was neither a dangerous instrument nor a deadly weapon as required by Section 569.020.1, RSMo. 1994.

No physical injury resulted and no immediate use of the stick against the cashier was possible. Also, the cashier testified she knew the defendant did not have a gun and no gun was displayed.

This is unlike a case where a defendant produces a toy gun or unloaded gun because those items can be used to give an apparent possibility to commit the robbery first degree by use of a dangerous weapon. Mere words are not equivalent to a gun or a reasonable facsimile of a gun.

UPDATE: CASE LAWS**WESTERN DISTRICT****State v. James Dixon**

No. 50292

Mo. App., W.D., Dec. 26, 1995

The defendant was charged with committing sodomy and sexual abuse of a 5-year-old girl.

During a police interrogation, he made a somewhat inculpatory statement.

A Division of Family Services worker interviewed the defendant two days after he was arraigned in jail and after his counsel had been appointed. The defendant was read some rights prior to the interview indicating the primary purpose of the investigation was not to look for evidence of a crime but it could result in prosecution and punishment.

The DFS worker interviewed the defendant a second time while he was in custody and again read the form to him. The worker did not ask him either time whether he was being represented by a lawyer or whether he wanted a lawyer present. She did not advise him of any of his constitutional rights.

During the two DFS interviews the defendant gave the same explanation as given police. The defendant added that he had a problem with sexual abuse and that he had accidentally touched the victim's vaginal area because she had jerked while he was tickling her thigh during a control game.

The worker put the statements in a DFS report and gave a copy to police. The state used the

statements to convict him of sexual abuse in the first degree.

On appeal the court found the circuit court erred in denying a motion to suppress his statements to the DFS worker because he was denied his rights to an attorney. The defendant had argued the DFS worker was a "government agent" and therefore her failure to inform him of his rights to refuse to answer questions and to have a lawyer present violated his federal and state constitutional rights.

The defendant had been charged and arraigned, was in jail and had an attorney representing him when the DFS worker interrogated him.

The DFS worker was not working independently of police. As mandated by Section 210.145, she worked jointly, exchanging reports with the police in the investigation.

Accordingly, the worker had become a governmental agent in the prosecution.

State v. Steven M. Power

No. 49633

Mo. App., W.D., Jan. 9, 1996

In a prosecution for unlawful use of a weapon under Section 571.030.1(4), the court did not err in declining to submit a self-defense instruction.

A correct self-defense instruction in a prosecution based on Section 571.030.1(4) must hypothesize the defendant's reasonable belief he was in imminent danger of "death, serious physical injury, rape, sodomy or kidnapping."

The defendant claimed he pulled a knife on the victims because they acted aggressively and one victim had pushed him. He stated he was tired of them yelling and pushing.

The victims' activity was not sufficient for the defendant to have a reasonable belief he was in imminent danger of death or serious physical harm.

There is no indication any activity by the victims justified using deadly force in the form of the defendant drawing a knife.

Elizabeth Ziegler, executive director of the Missouri Office of Prosecution Services, prepares the Case Law summaries for Front Line.

Courts say lights, no cameras, siren action

Don't bring along news crews to searches

FOR THE SECOND time in a year, federal courts have condemned the practice of police departments letting news cameras accompany officers when executing search warrants.



In *Parker v. Clarke*, 905 F.Supp. 638 (E.D. Mo. 1995), a local news crew accompanied police in the execution of a warrant at a residence where cocaine and weapons were recovered. The reporters rode to the scene with police and later broadcast a report.

The court held that bringing in reporters without the residents' permission was an "unreasonable" search and, therefore, a constitutional violation. The warrant authorizes **police** to enter. The court noted the reporters "were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. ..."

In the earlier case of *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), a police department was sued for letting a CBS news crew accompany officers.

The cases suggest a search warrant authorizes entry by police **only**. They do not forbid police from filming the execution of arrest or warrants, which can be useful evidence.

Turn on patrol car lights, siren to protect against liability claims

A STATE APPEALS COURT affirmed a jury ruling in which a Missouri police officer was held liable for \$150,000 after he collided with a civilian vehicle at a traffic light while on an emergency call.

The lower court had ruled the patrol car siren was not activated. There was no dispute the emergency lights were on.

In *McGuckin v. City of St. Louis*, 910 S.W.2d 842 (Mo. App. 1995), the court emphasized that under Missouri law, an officer's patrol car is not an "emergency vehicle" unless **both the lights and siren** are activated. The dispute focused on who had the green light and whether the siren was on.

Section 304.022, RSMo, allows an emergency vehicle to disregard certain traffic laws in emergencies. It also defines an emergency vehicle as one activating emergency lights **and** siren.

If an officer does **not** operate both, then he has no right to exceed the speed limit, to proceed against the light or to violate other traffic regulations. Even with red lights displayed, the officer is obligated to abide by all rules of the road as any motorist would.

With lights **and** siren on, an officer is entitled to disregard traffic laws and is entitled to the defense of "official immunity," which provides substantial protection to officers against civil liability claims.

In some states, the courts have essentially outlawed high-speed pursuits. Unwilling to follow this trend, Missouri recognizes that pursuits, while creating some risks, are necessary and important.

A cautious officer who activates lights and siren will be granted broad discretion in deciding how fast, and how, to pursue. Failure to activate all equipment will result in liability, no matter how serious the emergency.

Nation's top court will hear pretextual arrest case



A PRETEXTUAL ARREST case before the U.S.

Supreme Court could result in a ruling that will greatly impact law enforcement.

The top court has agreed to hear a case that could end conflict among the federal appellate circuits as to what constitutes a pretextual arrest.

The 8th Circuit Court of Appeals,

which includes Missouri, has held that as long as an officer (1) arrests for something that is a crime and (2) has probable cause to believe a crime has been committed, then the arrest is not pretextual.

The 8th Circuit attempts to determine **could** an officer arrest, not **would** he arrest.

However, other circuits attempt to

determine the officer's motivation by asking **would** an officer arrest under these circumstances.

For example, if an officer would not normally arrest for a stop sign violation, the court will consider a stop sign violation arrest "pretextual" and throw out the case — even though there was probable cause to arrest.

Front Line will keep you informed.

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